

FILED BY CLERK

MAR 28 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

KAJORNSAK PRASERTPHONG,

Appellant.

2 CA-CR 2006-0415

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-64663

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes

Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, Kajornsak Prasertphong was convicted of three counts of first-degree felony murder and three counts of armed robbery. *State v. Prasertphong*, 206 Ariz. 70, ¶1, 75 P.3d 675, 681 (2003). He was sentenced to death for two of the murders, to life imprisonment without possibility of release for the third, and to three concurrent twenty-one-year prison terms for the armed robbery convictions. *Id.* On appeal, Prasertphong was granted a re-sentencing on the two convictions for which he had been sentenced to death. *Id.* ¶¶ 97-98.

¶2 At the re-sentencing hearing, the state withdrew its notice of intent to seek the death penalty and sought consecutive life sentences on the ground the crime against each victim was “deserving of and entitled to a separate sentence.” Defense counsel did not object. The court imposed two consecutive, natural-life sentences, to be served consecutively to the natural-life sentence Prasertphong was currently serving for the third murder committed during the same episode. He has filed a new appeal, seeking relief from the imposition of the consecutive, natural-life sentences, arguing illegality and impossibility.

Discussion

¶3 Although he did not object when the sentences were imposed, Prasertphong now contends the trial court’s imposition of consecutive life sentences is unlawful because it is factually impossible for any defendant to serve additional life sentences after completing the first. The State responds that the claim is procedurally precluded, Prasertphong’s

sentences are consistent with Arizona statutes and case law, and he is not prejudiced by the sentences in any event; therefore, no fundamental error exists.

¶4 When a party fails to raise an issue before the trial court, the issue is forfeited on appeal unless fundamental error has occurred. *State v. Morales*, 215 Ariz. 59, ¶ 10, 157 P.3d 479, 481 (2007); *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Under a fundamental error review, the “defendant bears the burden of persuasion to show both that the error was fundamental and that it caused him prejudice.” *Morales*, 215 Ariz. 59, ¶ 10, 157 P.3d at 481. The imposition of an unlawful sentence generally constitutes fundamental error. *State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002).

¶5 An illegal sentence is one not authorized or directed by law or one not within the range provided by statute. *See State v. Suniga*, 145 Ariz. 389, 393, 701 P.2d 1197, 1201 (App. 1985). Under former A.R.S. § 13-708,¹

[e]xcept as otherwise provided by statute, if multiple sentences of imprisonment are imposed on a person at the same time . . . the sentence or sentences imposed by the court shall run consecutively unless the court expressly directs otherwise, in which case the court shall set forth on the record the reason for its sentence.

Division One of this court has stated:

[Section]13-708, which creates a generalized mandatory scheme in favor of consecutive sentencing, evidences a legislative intent that a criminal defendant be required to complete a previously

¹Section 13-708, A.R.S., was modified in 2007. However the enacted revisions do not affect the application of this statute in Prasertphong’s case.

imposed term of imprisonment prior to commencing serving a subsequently imposed term of imprisonment.

State v. Lucero, 161 Ariz. 466, 468, 778 P.2d 1362, 1364 (App. 1989). And, our supreme court has upheld the imposition of consecutive sentences when they were not limited to a term of years. In *State v. Burchett*, 107 Ariz. 185, 188, 484 P.2d 181, 184 (1971), for example, consecutive sentences were adjoined to a natural life sentence. The court upheld the sentences, finding them permissible under former Criminal Rule 339. *See also State v. Garza*, 192 Ariz. 171, ¶ 12, 962 P.2d 898, 901-02 (1998) (although no presumption created by A.R.S. § 13-708, consecutive sentences are default if concurrent sentences not designated by court). Prasertphong argues that *Burchett* is inapposite because it was decided under the former criminal rules; however, Rule 339 is the predecessor to Rule 26.13, Ariz. R. Crim. P., the substantially similar rule under which Prasertphong was sentenced.²

¶6 Since *Burchett*, our supreme court has consistently upheld the validity of consecutive sentences, even when the possibility of completing such sentences was unlikely or beyond natural life expectancy. In *State v. Bojorquez*, 111 Ariz. 549, 557, 535 P.2d 6, 14 (1975), the court upheld life sentences running consecutively to a prison term of seventy-five

²Rule 26.13 replaced Criminal Rule 339 in 1988 and was in effect at the time of Prasertphong's sentencing. It states:

Separate sentences of imprisonment imposed on a defendant for 2 or more offenses, whether they are charged in the same indictment or information, shall run consecutively unless the judge expressly directs otherwise.

to ninety-nine years. Similarly, in *State v. Watkins*, 126 Ariz. 293, 302, 614 P.2d 835, 844 (1980), the court approved consecutive sentences consisting of a 7.5- year sentence followed by a life sentence with the possibility of parole. *See also State v. Bishop*, 137 Ariz. 5, 9, 667 P.2d. 1331, 1335 (App. 1983) (upholding consecutive sentences totaling 109 years). Accordingly, we see no basis upon which to say the trial court abused its discretion or committed error, much less fundamental error, in sentencing Prasertphong to consecutive life terms.

¶7 Prasertphong nevertheless asserts his sentences should be found illegal, relying on *People v. Palmer*, 843 N.E.2d 292 (Ill. 2006). In *Palmer*, the Illinois supreme court modified appellant’s consecutive life sentences based on the actual impossibility of serving the sentences imposed and the “laws of nature.” *Id.* at 169. The court stated:

Defendant cannot serve two natural-life sentences in sequence, nor will the total amount of two or more natural-life sentences ever be more than the defendant’s one life. . . . Therefore, the sentences may not be consecutive, but must be concurrent.

Id. at 167-68. Although acknowledging the defendant suffered no actual prejudice from the imposition of consecutive sentences, the court in *Palmer* concluded that the “laws of nature” governed the defendant’s actual sentence; therefore, the defendant could only serve life sentences concurrently. *Id.* at 169-70. *See also People v. Spears*, 864 N.E.2d 758, 766 (Ill. App. Ct. 2007) (consecutive sentences reversed “where a defendant was sentenced to a term of years consecutive to a natural life sentence”).

¶8 We are not guided by the Illinois approach, however, because § 13-708 clearly permits consecutive sentences unless the trial court expressly states the sentences are to be served concurrently. *See also* Ariz. R. Crim. P. 26.13. This court must defer to the intent underlying governing statutes and decide cases consistently with the precedent of our supreme court. *See State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004); *see also City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). Indeed, the dissenting justices in *Palmer* noted that the majority there had overlooked legislative intent and “the significance of consecutive [natural-life] sentences to the public and to crime victims,” something the Illinois legislature apparently determined was meaningful “if only symbolically.” *Palmer*, 843 N.E.2d at 307.

¶9 We conclude that the question of impossibility does not prohibit imposing consecutive natural-life sentences under § 13-708 and that Prasertphong has not met his burden of establishing any illegality. Prasertphong has cited no Arizona case or other Arizona authority supporting his contention that the impossibility of serving all of his sentences necessarily renders them illegal. Nor can prejudice be established in this case because, whether served consecutively or concurrently, a successive natural-life sentence constitutes no greater period of imprisonment for the petitioner. *See Morales*, 215 Ariz. 59, ¶ 10, 157 P.3d at 481. *See also Palmer*, 843 N.E. 2d at 304-05 (acknowledging consecutive natural-life sentences result in no actual prejudice to defendant). Consequently, we conclude

the trial court's imposition of consecutive, natural-life sentences does not constitute fundamental error.

Disposition

¶10 Prasertphong's sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge